

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**CARLOS PRECIADO and
PATRICIA PRECIADO,**

Plaintiffs,

v.

No. 15-cv-0626 RB/SMV

**DANIEL HARTZOG,
GENE WILFERD, and
GENE WILFERD TRUCKING,**

Defendants.

**ORDER QUASHING ORDER TO SHOW CAUSE AND
VACATING PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

THIS MATTER is before the Court on Plaintiffs' Response to the Order to Show Cause [Doc. 38] and on their Objections to my Proposed Findings and Recommended Disposition [Doc. 39], both filed on May 24, 2106. I will quash the Order to Show Cause [Doc. 36] and vacate my Proposed Findings and Recommended Disposition [Doc. 37].

Background

Plaintiffs' case was removed to federal court in August 2015. [Docs. 1, 6]. Shortly thereafter, the Court set a telephonic status conference. [Doc. 7]. Plaintiffs' counsel failed to appear, and the status conference could not proceed. [Doc. 8]. The Court ordered counsel to show cause why he should not be sanctioned for his failure to appear. [Doc. 9]. Counsel responded to the order, and the Court quashed it. [Doc. 10].

On November 24, 2015, the Court set a telephonic status conference for April 21, 2016. [Doc. 22]. Plaintiffs' counsel again failed to appear, and the status conference could not

proceed. [Doc. 35]. The Court again ordered counsel (by this time, a second attorney had appeared for Plaintiffs) to show cause why they should not be sanctioned for their failure to appear. [Doc. 36]. Counsel's response was due on May 5, 2016. *Id.* By May 11, 2016, no response had been filed. Accordingly, I recommended that the case be dismissed with prejudice for failure to appear at hearings, failure to respond to the most recent Order to Show Cause, and for lack of prosecution. [Doc. 37] (citing Fed. R. Civ. P. 41(b), *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992)).

On May 24, 2016, Plaintiffs' counsel, Mr. McElhinney, filed an untimely response to the Order to Show Cause and objected to dismissal of the case. [Docs. 38, 39]. He indicated that the failure to participate in the case was attributable solely to him and not to his clients. [Doc. 38]. He explained that he missed the April 21, 2016 hearing because he had changed to a new account with his "practice management system," which caused calendaring errors. *Id.* at 1-2. He further explained that he overlooked the Court's Order to Show Cause (which was served by email) because he had received "well over 100 emails" that day. *Id.* at 3. He apologizes to the Court and to opposing counsel and says that his "lack of professionalism" was not willful. *Id.*

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Order to Show Cause [Doc. 36] is **QUASHED**.

IT IS FURTHER ORDERED that the Proposed Findings and Recommended Disposition to dismiss the action with prejudice [Doc. 37] are **VACATED**.



STEPHAN M. VIDMAR
United States Magistrate Judge